Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MIDWEST GAS USERS' ASSOCIATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Energy Regulatory Commission has exclusive authority under the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, and under the Natural Gas Policy Act, 15 U.S.C. § 3301 *et seq.* (Title I wellhead price controls repealed by P.L. 101-60, July 26, 1989) for establishing maximum lawful prices for first sales of natural gas at the wellhead and for guarantying the passthrough of those prices to the retail natural gas market. After extensive litigation and appeal, The D.C. Circuit ruled that certain state taxes levied on natural gas production in the state of Kansas (1) exceeded the maximum lawful price established under the NGPA and were unlawfully collected; and (2) should be refunded to the consumers who paid. The State of Kansas, through its utility regulatory commission, desires to divert these refunds to benefit the shareholders of the local distribution companies that it regulates instead of returning the unlawful overcharges to the customers who paid them. Such a program deprives the roughly one million Kansas customers who paid the overcharges of the benefits of the refund. The Federal Energy Regulatory Commission, with full knowledge of the decision of the Kansas Corporation Commission, refused to impose conditions on a settlement agreement that would assure the passthrough of the refunds to customers who were overcharged.

The questions presented are:

(1) Whether the FERC has the authority to condition a settlement agreement concerning refund of amounts improperly collected in excess of the NGPA's maximum lawful price under the NGPA to assure that the refunds are returned to the customers that paid the excessive and unlawful prices.

(2) Whether the FERC and the Federal Courts lack power to enforce the maximum lawful price regulations enacted by Congress in the Natural Gas Policy Act by causing unlawful overcharges to be returned to the consumers who originally paid those overcharges.

LIST OF PARTIES

Petitioner:

Midwest Gas Users' Association

Respondents:

Federal Energy Regulatory Commission

Missouri Gas Energy Company, a Division of Southern Union Corporation

Indicated Producers, consisting of

Amoco Production Company
Mobil Oil Corporation
OXY USA Inc.
RME Petroleum Co.
Union Pacific Resources Co.

Pioneer Natural Resources USA, Inc.

Missouri Public Service Commission

Kansas Gas Service Co., a Division of ONEOK, Inc.

Kansas Corporation Commission

State of Kansas

Williams Gas Pipelines Central, Inc.

STATEMENT PURSUANT TO RULE 29.6

Midwest Gas Users' Association is an unincorporated, voluntary, non-profit association of industrial and commercial natural gas users in the states of Missouri, Kansas, Nebraska and Arkansas, formed in the early 1950's for the purpose of representing the interests of these large commercial and industrial concerns in natural gas regulatory matters. Midwest operates solely for the purpose of promoting the general commercial, professional, legislative, or other interests of its membership in establishing and preserving reasonable rates and terms of service for large commercial and industrial natural gas customers.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Circuit of the District of Columbia in this case.

OPINIONS BELOW

The Orders of the Federal Energy Regulatory Commission review of which Petitioner seeks are:

Williams Gas Pipelines Central, Inc., 95 FERC (CCH) ¶ 61,055, Docket No. RP98-52-040 *et al.* "Order Approving Settlement," issued April 12, 2001; and

Williams Gas Pipelines Central, Inc., 95 FERC (CCH) ¶ 61,366, Docket No. RP98-52-041 *et al.*, "Order Denying Rehearing," issued June 11, 2001.

These Orders are included in the Appendix. The December 7, 2001 and February 15, 2002 Orders of the Court of Appeals, D.C. Circuit, granting a Motion for Summary Affirmance and denying rehearing or rehearing en banc, respectively, are not otherwise published, but are included in the Appendix.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Order Granting Summary Affirmance on December 7, 2001, and issued its Order denying a timely-filed Petition for Rehearing or for Rehearing En Banc on February 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Natural Gas Policy Act, 15 U.S.C. § 3431:

. . . .

(c) Guaranteed passthrough

. . . .

(2) Recovery of just and reasonable prices paid. For purposes of sections 4 and 5 of the Natural Gas Act (15 U.S.C. 717c, 717d), the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if, under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act, except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds

Natural Gas Policy Act, 15 U.S.C. § 3411. – General rulemaking authority

(a) In general. Except where expressly provided otherwise, the Commission shall administer this chapter. The Commission, or any other Federal officer or agency in which any function under this chapter is vested or

> delegated, is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this chapter.

Natural Gas Act, 15 U.S.C. § 717. – Regulation of natural gas companies

. . . .

> (b) Transactions to which provisions of chapter applicable. The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT OF THE CASE

This case concerns the diversion of some $45 million of refunded natural gas overcharges away from the parties that paid them under color of Federal law. It is rooted in collections of rates charged for natural gas sold under the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301, *et seq.* ("NGPA").

Title I of the NGPA established ceiling prices for natural gas sold at the wellhead to pipeline suppliers; these ceiling prices prescribed the maximum lawful price that could be charged by the producers for sales within the respective wellhead categories. 15 U.S.C. §§ 3311-19.[1]

Beginning in October 1983 and continuing through June 1988,[2] Kansas natural gas producers violated the NGPA's maximum lawful price ceilings by including Kansas *ad valorem* taxes in their charges. *Colorado Interstate Gas Co. v. FERC*, 850 F.2d 769 (D.C. Cir. 1988) (*"Colorado Interstate"*); *Public Service Company of Colorado v. FERC*, 91 F.3d 1478 (D.C. Cir. 1996), *cert denied*, 520 U.S. 1224 (1997).

In this case, the unlawful charges then were passed on by Williams Gas Pipelines Central, Inc., successor to Williams Natural Gas Co. ("Williams"), an interstate pipeline regulated by the Federal Energy Regulatory Commission ("FERC"), to local distribution companies and then to the retail customers, dollar for dollar. Williams' FERC-approved rate structure provided for this passthrough as a commodity charge to Williams' direct and indirect customers through its purchased gas adjustment clause and, in turn, through the similar automatic adjustment clause that was part of each local distribution company tariff. Although each local distributor had its own tariff, each operated to pass the unlawful charges directly through to the retail consumers.

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1. Nearly 15 years later, as a part of its deregulation program, Congress repealed the NGPA price ceilings effective in 1993. Pub. L. 101-60, Sec. 2b, July 26, 1989, 103 Stat. 158.

2. The producers actually charged such prices from the beginning of implementation of the NGPA in 1978, however, the relevant period established for refunds was proscribed as the period of October 1983 through June 1988 by *Public Service Company of Colorado v. FERC*, 91 F.3d 1478, 1490-91 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1224 (1997).

The tariffs of the local distribution companies were approved by the Kansas Corporation Commission ("KCC"), Kansas' regulatory agency. K.S.A. 66-101 *et seq.* Under Kansas law, approved tariffs have the force and effect of law. *Grindsted Products Inc. v. Kansas Corporation Commission*, 262 Kan. 294 (1997). Accordingly, retail Kansas customers were required by law to pay the unlawful charges as a part of the price they paid for natural gas purchased under the NGPA. Approximately one million Kansas customers paid a total of about $45 million in FERC-approved but still unlawful charges through their natural gas bills.

There is a long judicial history underlying this case. As early as 1983, petitions were filed with the FERC challenging whether the Kansas taxes should be included in the NGPA lawful ceiling price calculations. In *Sun Exploration & Production Co.*, 36 FERC ¶ 61,093, 61,233 (1986), FERC initially allowed producers to collect the taxes in addition to what otherwise would have been the maximum lawful price. The FERC's decision was appealed in *Colorado Interstate, supra*, but the Court of Appeals disagreed, remanding the issue back to FERC for further determination. On remand, FERC reversed its position and determined that collection of the Kansas taxes exceeded the maximum lawful price regulations, making the collections unlawful under the NGPA. FERC's new position was affirmed in *Public Service Company of Colorado v. FERC, supra.*

Public Service confirmed that a pricing violation had occurred and ordered that the excess charges would have to be refunded to the ***consumers*** that had paid the excessive charges. *Id.*, 91 F.3d at 1489. *Public Service* also characterized the intervening pipelines and distributors as "mere conduits for the ***flow of refunds from producers to consumers.***" *Id.*, at 1491 (emphasis added).

Later, the same Court in *Anadarko Petroleum Corp. v. FERC*, 196 F.3d 1264 (D.C. Cir. 1999), *vacated in part on reh'g*, 200 F.3d 867 (D.C. Cir. 2000), confirmed that the taxes should be refunded to the consumers ***with interest***, rather more than strongly suggesting that the consumers had been deprived of their property through the unlawful charges.

Following procedures established by FERC,[3] Williams sought refunds from 652 different producer interests totalling $45.8 million in principal and $88.4 million in interest calculated through May 31, 2000. Through compromises, 636 claims were eliminated. On February 23, 2001, Williams filed a Settlement Agreement ("Settlement") under FERC Rule 602, purporting to resolve the remaining claims.

Almost simultaneously, on March 6, 2001, the KCC began hearings on distribution of these refunds. The purpose of the hearings was to justify diverting all of the refunds to the regulated local distributors as an offset against certain unpaid customer bills. Out of the one million entitled Kansans, only some 50,000 customers were to have their bills all or partly offset. On May 3, 2001, the Kansas Corporation Commission entered an order adopting this approach.

At FERC, several parties opted out of the February 23 Settlement, and Midwest timely objected to the Settlement on the basis that in *Public Service Company of Colorado v. FERC, supra*, and *Anadarko Petroleum Corp. v. FERC, supra*, the Court of Appeals had directed that the unlawful charges should be refunded to the ***consumers*** who had originally paid them. The Settlement provided neither protection nor assurance of this result. The KCC, acting with entirely opposite purposes, was proceeding on a course to confiscate the refunds and divert them to the benefit of the

3. *Public Service Company. of Colorado, et al.*, 80 FERC ¶ 61,264 (1997), *reh'g denied*, 82 FERC ¶ 61,058 (1998).

shareholders of the local distributors. Under the KCC plan, Midwest' Kansas members, who had paid roughly 30% of the unlawful charges to which refunds would attach, would have their refunds of roughly $12 million taken from them and given to local distributors' shareholders. Further, the refunds of roughly one million Kansans, valued at roughly $45 million, would be confiscated and given over to the local distribution companies.

In both its original Protest and its Application for Rehearing, Petitioner Midwest sought to draw FERC's attention to the actions of the Kansas Corporation Commission and demonstrated that the action of the KCC contravened the express intent of the NGPA and the NGA. Nevertheless, in approving the Williams February 23 Settlement (Appendix A, p. 1a), and in subsequently denying Midwest's Application for Rehearing (Appendix B, p. 32a), the FERC stated that it lacked authority to impose conditions on the Settlement that would protect the consumers claiming that to do so would regulate retail distribution, an area of regulation claimed to be exclusively within the province of state regulatory authority.

Midwest's request for rehearing was denied (Appendix B, p. 23a), and a Petition for Review pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r, was timely submitted to the Circuit Court of Appeals for the District of Columbia. On December 7, 2001, a Motion for Summary Affirmance was granted by that Court. Appendix C, p. 33a. Midwest's timely Petition for Rehearing or Rehearing by the Court En Banc was denied on February 15, 2002. Appendix D, p. 36a. Midwest now seeks a writ of certiorari from this Court.

In failing to address a known condition that is violative of the directives and purpose of the NGPA and the NGA, FERC abandoned its statutory mandate and failed to comply

with the mandates of the Court of Appeals. Unless corrected, FERC's decision will result in the vast majority of the one million Kansas natural gas customers being denied refunds of the NGPA-violating overcharges they paid that were originally charged to them under color of Federal law.

REASONS FOR GRANTING THE WRIT

This Petition should be granted for at least two reasons. *First*, absent correction, FERC's actions will redistribute millions of dollars unlawfully collected in violation of Congress' maximum price ceilings to parties who were mere conduits, did not pay and have no interest in or claim to the overcharges, and will do so in complete derogation of the consumer protections purportedly provided to these customers by the NGPA.

The price ceilings of the NGPA were enacted by the Congress to protect consumers, not producers, interstate pipelines, nor local distributors. Here charges were found to have exceeded the protective ceilings enacted by the Congress. It is nonsense to argue that neither the FERC nor the Federal courts have sufficient jurisdiction under the NGPA to rectify this wrong and refund the unlawful charges to those who paid them under color of the NGPA.

The NGPA, the NGA, and previous decisions of this Court establish a clear framework for establishing prices and regulating transportation of natural gas. This framework would be seriously undermined by allowing the FERC to avoid its responsibilities through a purported jurisdictional gap. Moreover, the regulatory framework will be changed in a fashion that will expose future retail ratepayers to the confiscation of their money through Federally established rates with no Federal forum in which to determine their right to refund.

Second, the FERC's jurisdictional escape hatch and the acquiescence of the Court of Appeals, if permitted, will deny Petitioners and the one million Kansas customers who paid the overcharge any Federal determination of their legal rights under Federal law to the charges that have been held to have been unlawfully collected under Federal law.

Despite salutary language in earlier opinions expressing concern for the consumers and customers that Congress sought to protect through imposing price ceilings, FERC and the Court of Appeals have failed to recognize the claims of Petitioners, disregarding the body of Federal law that produced the overcharges now being refunded. Rather than directly decide the claims of Petitioners to the refunds, FERC and the Court of Appeals have avoided the issue leaving Petitioners with no resolution and no Federal forum for consideration of their claim for return of property taken from them or means of effectively protecting their interests.

A. FERC's Refusal to Direct Refunds to the Customers Who Paid Them Abdicates Its Duties Under the Natural Gas Act and the Natural Gas Policy Act and Should Be Corrected.

Both the NGA and the NGPA had at their core the purpose of providing rate protection to the end use consumer. NGPA additionally sought to balance the developing energy needs of the nation with this protection. This purpose was clearly recognized in the Federal judicial decisions ordering refunds of the Kansas taxes that were unlawfully passed through to consumers under Federal law. *Public Service Company of Colorado v. FERC, supra; Anadarko Petroleum Corp. v. FERC, supra*. Even if the FERC's jurisdiction over refunds that impact retail rates was in question, a recent decision by this Court in *State of New York v. FERC*, 535 U.S. __, 122 S. Ct. 1012, 152 L. Ed. 2d 47, 70 U.S.L.W.

4166 (2002) establishes that the FERC may engage in regulation of retail activity. Finally, even if it is still argued that FERC has no authority to deal with local or retail issues as to ***lawful*** charges, FERC certainly has remedial authority under the NGPA to force the refund of charges held ***unlawful*** under that Federal law.

1. The NGPA Was Designed to Provide Protection to Retail End-Use Customers.

The mid-1970's saw an "energy crisis" resulting in Congressional passage of both the Public Utility Regulatory Policies Act, 16 U.S.C. § 2601 *et seq.* and the NGPA. In its 1978 NGPA, Congress sought to balance the concerns of encouraging conservation, increasing energy production and protecting consumers. The NGPA's multiple price ceilings were intended to mitigate the effect of wellhead price decontrol while rewarding producers for developing new sources of gas and allowing pricing to escalate with inflation. This Congressional purpose is frustrated by FERC's failure to exercise jurisdiction.

2. Incremental Pricing Under the NGPA Extended Direct Federal Regulation of Pricing for Retail Customers.

It is also certain from the NGPA that Congress intended its reach to encompass state regulators and end-users. Proof is found in the NGPA's incremental pricing provisions.

Sections 201-04 of the NGPA provided for an alternate fuel equivalent incremental pricing regime. Incremental pricing surcharges were directed to industrial boiler fuel end-users to eliminate any incentive those users might have to increase their use of natural gas. These incremental pricing regulations were directed at ***retail*** end-user industrial boiler

fuel consumers. FERC was empowered to develop the incremental pricing surcharge; FERC was empowered to calculate the NGPA maximum lawful prices that producers could charge. Certainly based on the previously noted litigation at the Court of Appeals, the Court of Appeals upheld FERC's authority to make these calculations.

Congress, exercising its commerce powers, reached through these respective "conduits" to decree that industrial boiler fuel customers who were behind local distributors should nevertheless pay the incremental fuel surcharge. Collection was through a surcharge that applied to "incrementally priced industrial facilities served indirectly through any other interstate pipeline ***or any local distribution company***." Section 204(c)(2)(b) (emphasis added). In Section 205(d), Congress explicitly preempted state or local laws that mitigated these passthroughs and prohibited state regulators from actions that might dilute their effect. NGPA Section 506 even authorized the United States Attorney General to bring enforcement or injunctive actions to effectuate these provisions.

In the face of such full exercise of its commerce power, it is disingenuous to assert that neither the FERC nor the Federal judiciary possess the ability to fully rectify the violation of Congress' price ceilings. Nor is it sensible to argue that the overcharge has been refunded by diverting the consumers' refunds to the benefit of the local distributors' shareholders. An overcharge to "A" is not refunded by paying "A's" refund to "B".

This exercise of direct authority over retail rate issues confirms a Congressional intent under the NGPA that will be thwarted by FERC's failure to protect retail customers here.

3. Judicial Decisions Authorizing the Refund of Kansas Taxes Express the Intent That the Refunds Be Returned to the Customers That Paid Them.

The refusal of the Court of Appeals to squarely address the question of ratepayers' interest in the refunds is puzzling in light of that Court's own rulings ordering the refunds and establishing consumers' rights to them. In *Public Service Company of Colorado v. FERC*, 91 F.3d 1478, 1492 (D.C. Cir. 1996); the Court of Appeals stated:

> Producers are liable to refund all Kansas ad valorem taxes collected with respect to production since October 1983. . . . ***There is no substantive reason therefore, to deny customers all the relief to which they are entitled***.

The *Public Service* Court also noted that some retroactivity in the refund date

> properly balances the producers' equitable claim to notice ***against the consumers' legal right*** to receive a refund of all unlawfully collected charges.

91 F.3d at 1489 (emphasis added). The same Court noted that there was "well established precedent for treating pipelines as ***mere conduits*** for the flow of refunds ***from producers to consumers***." 91 F.3d at 1491 (emphasis added) (internal citations omitted).

The term "customers" was illuminated later in *Anadarko Petroleum Corp. v. FERC, supra*, when the Court of Appeals stated:

> [t]here is ***no reason why, in the Commission's words, 'overcharged consumers should forego refunds they are entitled to***, to the extent producers paid more ad valorem taxes to Kansas localities than they should have.

Anadarko Petroleum Corp. v. FERC, supra, 196 F.3d at 1269. Thus the term "customers" referred to the retail customer to whom NGPA prices were passed through pursuant to 15 U.S.C. § 3431(c).

The clear language of these cases manifests intent that the refunds will follow a reversal of the path that was used to collect the unlawful charges from the retail ratepayer. The Court of Appeals used the words "passed through" in describing the charge of the NGPA to the FERC to assure that maximum lawful prices were tracked from producer to consumer. Yet in the face of these seemingly plain statements of intent to return unlawful charges to those who paid them, namely the consumers, the FERC now takes the position that it is powerless to provide correction of its own errors to the intended beneficiaries of the judicial decisions.

This position stands Congress' regulatory scheme on end by holding that the FERC has full authority to assure ***collection*** of rates and surcharges from end-use consumers, but strangely lacks the authority to ***refund*** those charges that were unlawfully passed through the pipeline and distribution system. Moreover, the Court of Appeals – having once ordered that ad valorem taxes be refunded to the consumers, and then again having ordered that refunds were to accrue interest thereby further evidencing an understanding that the money came from retail customers who were entitled now to compensation through interest for the lost use of their funds – that same Court now finds that the FERC is powerless to take the necessary steps to assure that the refunds are returned to those who paid them.

The Court of Appeals relied upon *FERC v. Martin Exploration Management Co.*, 486 U.S. 204, 207 (1988). Reliance on *Martin* does not support the creation of the regulatory gap being created by the decisions below. Rather, *Martin* supports Petitioner that NGPA Section 501, 15 U.S.C.A. § 3411, gives FERC authority to enter "such orders as it may find necessary or appropriate to carry out its functions." 486 U.S. at 213. Attaching conditions to assure compliance with Court of Appeals' directives as requested by Midwest would seem both appropriate and necessary and therefore well within the FERC's jurisdiction. *Martin* thus substantiates Petitioner's position that FERC has the authority under the NGPA to direct refunds to the customers by use of orders that impose appropriate conditions on the Williams February 23 Settlement.

B. The FERC's Jurisdictional Argument Conflicts With This Court's Recent Rulings.

If the FERC's claim that it lacked jurisdiction to reach to the retail market was ever correct under the NGA, this position no longer is appropriate. Recently, this Court approved the extension of FERC regulatory authority into retail energy transactions in *New York et al. v. FERC, supra*.[4] Upon nearly identical language of the Federal Power Act,[5]

4. The *New York v. FERC* decision was released on March 8, 2002, roughly three weeks after the Court of Appeals denied Petitioner's Request for Rehearing or Rehearing En Banc. Thus this decision was not available to the Court of Appeals at the time of its last decision.

5. The companion section of the Federal Power Act, Section 201(b), 16 U.S.C. § 824(b), refers to the "transmission of electric energy" instead of the NGA's "transportation of natural gas." Similarly, the Federal Power Act refers to "sale of electric energy at wholesale in interstate commerce" in lieu of the NGA's "sale in interstate commerce of natural gas for resale." In all other respects, the two sections are identical.

this Court held that FERC could engage in regulation of unbundled electric transmission at the retail level. In recognition of the similar language and timing of their passage, this Court has established a practice of citing interchangeably decisions interpreting the Federal Power Act ("FPA") and the NGA. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

New York v. FERC, supra, construed the provisions of the FPA to give FERC authority to regulate unbundled electric transmissions by retail utilities, extending FERC's authority into the retail market as a logical construction of the FERC's authority over transmission. This Court found that there were no limitations in the FPA over transmission and that unbundled retail transmissions are "electric energy in interstate commerce." *Id.*, Slip Opinion, p. 14. Accordingly, this Court affirmed regulation of both price and terms of service relating to unbundled *retail* transmission of electricity.

FERC's authority to regulate natural gas transportation is certain irrespective of whether the gas transported is ultimately sold at retail or wholesale. *FPC v. Louisiana Power & Light Company*, 406 U.S. 621, 636 (1972). Certainly, the FERC's authority under the NGA should be accorded similar reach to its authority over electric transmission. This is particularly appropriate where the NGPA conferred upon FERC certain pricing authority coupled with the obligation to guarantee the passthrough of properly established maximum prices. 15 U.S.C. § 3431(c). In this instance, the FERC's authority was not merely limited to oversight of transportation, but its authority included an express duty to assure passthrough of no more than the maximum lawful prices. Any reasonable construction of the FERC's authority must necessarily include the power to correct – the power to direct refunds that fully rectify the wrong done – the power

to see that the unlawful collections are returned to the ultimate consumers who paid them. The ability to require refunds is essential to enable FERC to remedy for overcharges.

In the instant case, the need for such power is readily apparent. Though the history of the matter is complex, the resulting issue is merely how refunds of the unlawful overcharges are to be returned. Despite Petitioner's concerns, the FERC refused to take actions that would assure that the distribution of refunds would remain consistent with federal law and policy regarding return of the ad valorem taxes. The NGPA expressed Congress' creation of a detailed structure to assure that wellhead prices were accurately passed through to retail customers. In addition, the judicial decisions creating the refunds of *ad valorem* taxes contain repeated references to customers and consumers interchangeably. Thus the statutory and case law framework for determining who has a legal interest in the refunds all point to the retail customers who paid the unlawful overcharges as the proper recipients. Yet the FERC deferred to state authority rather than fulfill its obligation to assure that the proper parties receive the refunds.

C. The FERC's Abdication of Jurisdiction Regarding Refund of Unlawfully Charged Kansas Taxes Leaves Customers Without the Protection of Law As to the Unlawful Charges.

The regulation of, and setting of rates for, natural gas service in interstate commerce has long been the province of the FERC and its predecessor, the Federal Power Commission. Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), provides that the FERC has jurisdiction over the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale. Pertinent to the issue at hand, the FERC was given specific authority

under the Natural Gas Policy Act to establish maximum lawful prices; the passthrough of such costs was specifically directed by the Congress. Under the NGPA, "first sale" prices, once established by the FERC, were deemed to be just and reasonable. 15 U.S.C. § 3431(b). In addition, prices so determined as just and reasonable were assured a "guaranteed pasthrough" under 15 U.S.C. § 3431(c):

> [T]he Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if, under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act. . . .

FERC was given a pervasive role in establishing natural gas pricing and assuring that the pricing was properly passed through to the retail level. Congress clearly sought to transfer the prices accurately and directly to the consumer with FERC designated as the watchdog.

Even if it were assumed that neither FERC nor the Federal courts have power to interfere in the collection of ***lawful*** charges at local levels, it simply does not follow that these institutions lack jurisdiction to effect refunds of charges that were collected in violation of Federal law. A clear distinction may be made that while state regulators may be free to regulate the affairs of the utilities under their supervision without Federal involvement, when charges are collected under color of Federal law and are subsequently found to have been collected in violation of Federal law, the Federal government has an interest in seeing that the wrong that has been done under color of its authority is fully corrected.

Implicit in the role of assuring the consistent implementation of natural gas pricing is the companion role of redressing overcharges that result from improper pricing. The Congress clearly provided for the guaranteed pass through of the pricing mechanism established under the NGPA, and it would defy reason to argue that Congress had no intent that remedies for improper pricing would not receive similar protections.

This view, if accepted will leave all ratepayers vulnerable for the law will become one of certainty where rate *collection* is involved, but where unlawful overcharges occur, ratepayers will have no similar forum for *refund* relief. The otherwise seamless web of federal/state regulation will develop a tear between state and federal authority such that retail customers will have nowhere to assert claims of entitlement to refunds.

Consideration of the Kansas tax refunds is unique. Consequently, the issues raised here cannot be left for further determination by the lower courts. Because of the singularity of this occurrence, the issues cannot be left for resolution under other circumstances in other jurisdictions. The matters here will likely not occur again, and Petitioners will have no further opportunity to obtain redress.

CONCLUSION

For the foregoing reasons, the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER APPROVING SETTLEMENT ISSUED APRIL 12, 2001

UNITED STATES OF AMERICA 95 FERC ¶ 61,055
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
William L. Massey, and Linda Breathitt.

Williams Gas Pipelines Central, Inc.

Docket No. RP98-52-040

ORDER APPROVING SETTLEMENT

(Issued April 12, 2001)

On February 23, 2001, as amended on March 22, 2001, Sponsoring Parties[1] filed a Settlement Agreement (Settlement) under Rule 602 of the Commission's Rules of Practice and Procedure in the above-captioned docket. The Settlement is intended to facilitate and expedite the Commission's implementation of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Public Service Company of Colorado v. FERC* (*Public*

1. Sponsoring Parties consist of Williams Gas Pipelines Central, Inc., formerly Williams Natural Gas Company (Williams), Ash Grove Cement, Atmos Energy Corporation, Farmland Industries, Inc., FMC Corporation, Heartland Cement, Kansas Gas Service Company, a Division of ONEOK, Inc., the Kansas Corporation Commission (KCC), Kansas Industrial Energy Supply Company, Lone Star Industries, Inc., Amoco Production Company, Pioneer Natural Resources USA, Inc., Mobil Oil Corporation, OXY USA Inc., and Union Pacific Resources Company.

Service)[2] involving the refund of Kansas *ad valorem* taxes. The Settlement is a partial resolution of *ad valorem* tax refund claims asserted by Williams that were not resolved by a previous settlement that resolved certain *ad valorem* tax refund claims made by Williams.[3] The Commission approved the Superseding Settlement in Docket No. RP98-52-038 on October 11, 2000,[4] as clarified on December 13, 2000, in Docket No. RP98-52-039.[5] For the reasons stated below, the Commission approves the Settlement.

I. Background

In *Public Service*, the Court upheld the Commission's decision that Kansas *ad valorem* taxes were improperly added to the maximum lawful prices under the Natural Gas Policy Act (NGPA), and ordered first sellers/producers to make refunds of reimbursements they had received from Williams for certain *ad valorem* taxes. The Commission had required refunds commencing in June 1988. The Court's decision extended the refund requirement to the period from October 1983 through June 1988. On September 10, 1997, the Commission issued an order (Procedural Order) implementing the *Public Service*

2. 91 F.3d 1478 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1224 (1997).

3. The parties refer to the earlier settlement as the "Superseding Settlement" because it replaced one Williams had filed on October 1, 1999. Therefore, we will also refer to the earlier settlement as the Superseding Settlement.

4. 93 FERC ¶ 61,030 (2000).

5. 93 FERC ¶ 61,263 (2000).

decision.[6] The Procedural Order established procedures and timetables for producers to make refunds to the pipelines and for the pipelines to flow the refunds through to their customers. The Procedural Order also denied requests for generic relief from the interest obligation associated with the *ad valorem* tax refund principal but provided first sellers could apply for exception relief on a case-by-case basis under section 502(c) of the NGPA. The Court affirmed the Commission in *Anadarko Petroleum Co. v. FERC.*[7]

The Commission also stated that the refund obligations attributable to royalty interest owners could be waived if such refunds were shown to be uncollectible in accordance with the standards in *Wylee Petroleum Corporation v. FERC*, 33 FERC ¶ 61,014 (1985). Subsequently, in an order issued June 10, 1998, the Commission held that the producer who operates a well is responsible only for refunds attributable to its own working interest, and other working interest owners are responsible for refunds related to their working interests.[8]

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6. Public Service Co. of Colorado, *et al.*, 80 FERC ¶ 61,264 (1997), *reh'g denied*, 82 FERC ¶ 61,058 (1998).

7. 196 F.3d 1264, *reh'g*, 200 F.3d 867 (D.C. Cir.), *cert. denied*, 147 L Ed.2d 248 (June 6, 2000). The Court remanded one issue concerning the starting date for refunds, and the Commission issued an order addressing the remand, Public Service Company of Colorado, 91 FERC ¶ 61,025, *reh'g denied*, 93 FERC ¶ 61,264 (2000), *appeal pending sub nom*, Atlantic Richfield Co. v. FERC, No. 01-1065 (D.C. Cir. filed Feb. 9, 2001).

8. Williams Gas Pipelines Central, Inc. *et al.*, 83 FERC ¶ 61,351 (1988). The D.C. Circuit affirmed the Commission's ruling in an unpublished opinion in Colorado Springs Utilities v. FERC, No. 98-1582 (D.C. Cir. decided December 9, 1999).

Appendix A

In accordance with procedures established by the Commission, Williams sought refunds from 652 operators and working interest owners (WIO). The refunds sought by Williams totaled $45.8 million in principal and $88.4 million in interest through May 31, 2000. Many of the parties from whom Williams sought refunds disputed Williams' claims, and/or sought relief in formal proceedings filed with the Commission. In an effort to resolve these matters, representatives of the various interests involved in the proceeding participated in extensive settlement discussions that led to the filing of the Superseding Settlement on August 7, 2000. The Commission subsequently approved the Superseding Settlement, which eliminated the claimed refund obligations of 636 of 652 working interest owners that Williams had identified as having refund obligations.

Williams is also one of the interstate pipelines involved in a proceeding before the Kansas Corporation Commission in Docket No. 99-GIMG-068-GIG that pertains to a portion of Williams' non-jurisdictional *ad valorem* tax refunds.[9]

Since the Commission's approval of the Superseding Settlement, the remaining parties have engaged in continuing discussions in an effort to structure a settlement that would resolve the remaining outstanding refund claims in this proceeding. The subject Settlement resulted from those discussions. The Settlement, along with a Stipulated Settlement Agreement filed with the KCC (and attached to

9. "In the Matter of a General Investigation Upon the Motion of the Commission Staff to Establish General Policies With Regard to Distribution of Kansas Ad Valorem Tax Refunds from Interstate Pipeline Companies to Kansas Jurisdictional Direct Sales Customers."

the Settlement as Appendix C), will resolve all issues between the Settling Parties, but will not affect claims among non-Settling Parties. Sponsoring Parties expect that approval of the Settlement, as revised, will resolve 58.9682% of all the outstanding claims, leaving only the claims related to refunds due to Missouri jurisdictional customers outstanding.[10] To bring substantial immediate relief to many consumers and to simplify the remaining issues to be resolved, Sponsoring Parties request the Commission to approve the settlement without modification by April 13, 2001.

In accordance with the terms of the Settlement, Williams filed an amended Settlement on March 22, 2001, to reflect changes due to the additional Missouri parties that elected to participate in the Settlement.

II. The Settlement

The Settlement is available on a voluntary basis to all parties with an interest in these proceedings. Producers who accept the terms of the Settlement, and make payment in accordance with its terms, will become Settling Producer Parties. Settling Producer Parties will receive a 25% credit toward their refund obligation.

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10. Sponsoring Parties originally expected the Settlement to resolve 58.9040% of the claims. That number was revised to 58.9682% to reflect the additional Missouri parties electing to participate in the Settlement. The 58.9682% represents 58.8749% relating to Non-Missouri Settling Non-Producer Parties and 0.0933% relating to Missouri Settling Parties.

Appendix A

Parties who are entitled to receive a share of the Kansas *ad valorem* tax refunds on the Williams system and all of the state commission that regulate one or more of such entities are considered to be Non-Producer Parties. All Non-Producer Parties will be deemed to be Settling Non-Producer Parties unless they elect to opt out of the Settlement in accordance with the procedures specified in the Settlement.[11] The portion of the Non-Producer Parties' interest in Williams' Kansas *ad valorem* refund attributable to the Settling Non-Producer Parties is referred to as the Settlement Percentage.

If any state commission elects not to be bound by the Settlement and serves notice in accordance with the Settlement's provisions, its election will be effective so that all parties whose rates are regulated by the electing state commission will be deemed to have elected not to be bound by the Settlement. The rights and obligations of any party electing not to be bound by the Settlement will be unaffected by the Settlement with respect to the portion of its interest covered by the notice.

Payments received by Non-Producer Parties under the Superseding Settlement will have no impact on the rights of Non-Producer Parties under the Settlement and the terms of the Settlement will have no impact on the rights of the Non-Producer Parties to participate in the benefits of the Superseding Settlement.

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11. In its reply comments, Williams advised that parties electing to opt out of the Settlement consist of the MoPSC, City Utilities of Springfield, Missouri, Missouri Gas Energy, UtiliCorp United (only with respect to the interests of its Missouri customers), and Greeley Gas Company (only with respect to the interests of its Missouri customers)

Appendix A

The Settlement is subject to and conditioned upon final approval without modification by the KCC of the separate Stipulated Settlement Agreement, attached as Appendix C, that was filed in Docket No. 99-GIMG-068-GIG attributable to Williams only.[12] The Stipulated Settlement Agreement was submitted, on the same date that the Settlement was filed at the Commission, to the KCC for approval. The Stipulated Settlement Agreement resolves issues regarding the KCC's jurisdiction over Williams' retail sales during 1983 to 1988 and establishes the amount of nonjurisdictional sales Williams made in Kansas that are subject to the KCC jurisdiction.

A summary of other provisions of the Settlement follows:

Release from Liability

Settling Producer Parties will be released from any further liability to Williams and any other party with respect to the entire non-jurisdictional portion of their refund obligation and with respect to the part of the jurisdictional portion of their refund obligation represented by the interests of the Settling Non-Producer Parties.

Williams will continue to have a claim against each of the Producer Parties including the Settling Producer Parties for that portion of their refund obligation related to the refund claimed by the Non-Producer Parties that opt out of the Settlement. The interests of Non-Producer Parties who opt

12. The KCC states the KCC docket was opened in 1998 to investigate *ad valorem* tax refunds attributable to nonjurisdictional sales within Kansas.

out of the Settlement are not released or compromised as a result of the Settlement. With respect to the claims of the Non-Producer Parties who opt out of the Settlement, the Settling Producer Parties will retain all of their claims and defenses, as well as all rights to continue, pursue or initiate litigation in any forum.

Williams, each Settling Producer Party and each Settling Non-Producer Party release all claims other than those specifically preserved in the Settlement that they may have against a party bound by the Settlement related to Kansas *ad valorem* tax refund claims arising from Williams' refund proceedings for all refund periods before June 28, 1988.

As of the date the Settlement is effective, Settling Producer Parties waive and release all claims associated with Kansas *ad valorem* tax refunds for periods through June 28, 1988 by each such Settling Producer Party against any royalty interest owner for royalty-related Kansas *ad valorem* tax refund claims on the Williams system, but only to the extent that the claims against royalty interest owners are attributable to the interests of the Settling Non-Producer Parties. Settling Producer Parties will refund any amounts, without interest, to royalty interest owners that the royalty interest owners paid before the Settlement's effective date for refunds associated with Kansas ad valorem tax refunds for periods through June 28, 1988 on the Williams' system covered by the Settlement.

Appendix A

Settlement Payments

Each Producer Party's refund obligation due under the Settlement is shown on Appendix A. This refund obligation is calculated by reducing the total principal and interest due from each Producer Party by 25%.[13] Next, this reduced obligation is multiplied by the Settling Non-Producer Parties' interest (58.9682%) to determine the Producer Party's refund obligation to the Settling Non-Producer Parties.[14] Then, any prior payments that the Producer Party made to Williams, as adjusted to reflect only the Settling Non-Producer Parties' interests, are subtracted from the net refund obligation due. This results in the final refund obligation due for each Producer Party.

Settling Producer Parties must pay their net refund obligation to Williams no later than 12 days after the Settlement's effective date. Producers who previously refunded to Williams more than their refund obligation shown on Appendix will be entitled to a refund unless they opt out

13. Interest is calculated at the Commission rate if an escrow account was not established or at an estimated escrow rate if an escrow account was established. Interest will continue to accrue until the Interest Cut-Off Date, which is 60 days before the Settlement becomes effective.

14. Certain Settling Producer Parties were relieved of some refund obligations by the Superseding Settlement because a portion of their refund obligation was stated as a separate line item that was automatically waived. The figures listed in Appendix A include the amounts previously relieved in the Superseding Settlement. The parties intend that the total refund credit for Settling Producer Parties under this Settlement will not be greater than this 25% credit.

of the Settlement. Williams will refund such overpayments, with interest, no later than 20 days after the Settlement's effective date.

Effective Date

The Settlement will become effective on the first date on which both of the following conditions are satisfied: (A) the Commission's order approving the Settlement is final and non-appealable and (B) the KCC's final agency action approving the Stipulated Settlement Agreement attached as Appendix C to the Settlement is final and non-appealable.

Acceptance by the Settling Parties of each agreement is conditional upon entry of a final Order approving each agreement by the FERC and the KCC, respectively. Failure by either regulatory body to enter the appropriate Order, without material change, or failure for any reason of either Order to become final shall void both agreements.

Distribution

Williams will distribute (by refund or credit to unpaid bills) the amounts it receives under the subject Settlement within 14 days of the date on which it receives payment. Pursuant to the Superseding Settlement, any funds Williams receives will be applied first i) to reimburse Williams for the net amount of the Settling Non-Producer Parties' portion of the refund payments that Williams returned to producers under the Superseding Settlement plus interest at the Commission's established rates, and ii) refunds to Settling Producers that previously paid more in refunds than they are

required to under the Settlement. The amount received by Williams under the Settlement related to the interests of the Non-Missouri Settling Non-Producer Parties less their portion of Williams' refunds described above will be allocated to the Settling Non-Producer Parties as follows:

1. Kansas Jurisdictional Customers: 68.6535%
2. Kansas Non-Jurisdictional Customers: 16.6550%
3. Oklahoma Jurisdictional Customers: 5.1894%
4. Nebraska Jurisdictional Customers: 0.6487%
5. Texas Jurisdictional Customers: 0.0701%
6. Colorado Jurisdictional Customers: 0.0175%
7. Williams: 8.7658%

The amount received by Williams under this Settlement related to the interests of the Missouri Settling Non-Producer Parties less their portions of Williams' refunds described above will be allocated to those Missouri customers listed on Appendix B (as revised) that did not opt out of the Settlement.

Amounts allocated to the various jurisdictional groups will be distributed pursuant to the percentage allocations in Appendix B to the Settlement. Total refunds to Settling Non-Producer Parties will be reduced by the Kansas *ad valorem* tax refunds previously received by those parties except those pertaining to the Superseding Settlement.

If the Commission approves the Settlement without modification, the non-settling Non-Producer Parties will not be bound by the percentages set forth in Appendices A and B

as to the allocation between jurisdictional and non-jurisdictional customers or by the percentages allocated to specific customers set forth in Appendix B.

Effect of Subsequent Judicial Determinations and Legislation

The Settling Parties intend the Settlement Agreement, together with the Stipulated Settlement Agreement attached as Appendix C, to be a full and complete resolution of any and all issues related to Kansas *ad valorem* tax refunds on the Williams' system, to the extent of the interests of the Settling Parties, and this Settlement Agreement will govern the rights and obligations of the Settling Parties thereon. Should any decisions in cases currently pending in federal and state courts related to the legal rights and obligations of the parties with respect to the payment and distribution of Kansas *ad valorem* tax refunds conflict with this Settlement Agreement, and apply to Williams and its customers, the terms of this Settlement Agreement shall apply in lieu of any such decisions, to the extent allowed by law, with respect to the claims of the Settling Parties.

Regardless of any legislative enactment, whether presently pending or subsequently introduced or enacted, the Settlement shall govern the rights and obligations of the Settling Parties, to the extent allowed by law.

III. Comments

Public notice of the Settlement was issued on March 1, 2001, with initial comments due as provided in section

154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2000)). Reply comments were due on March 22, 2001.

Farmland Industries, Inc. (FI), a sponsoring party to the Settlement, filed a late motion to intervene in support of the Settlement. TPI Petroleum, Inc. (TPI) filed a late motion to intervene asserting that it is entitled to refunds since Williams was the pipeline supplier to its predecessors during the relevant time period.[15] Midwest Gas Users' Association (MGUA) also filed a late motion to intervene asserting that its members, as customers of Williams during the relevant time period, are entitled to refunds.[16]

MGUA filed objections to and comments on the proposed settlement. MGUA asserts that during the relevant refund period, its members were customers of Williams and its predecessors, purchasing approximately 30% of the total volumes sold by Williams during that period and paying approximately 30% of the total volumetric overcharges on the Williams system. MGUA protests that the Settlement does not give assurance to Kansas ratepayers that they will ultimately receive their appropriate share of refunds. MGUA maintains that to assure Kansas ratepayers that they will receive their appropriate share of refunds, the Commission should not approve the Settlement without a condition requiring Williams to make payments to: (1) Midwest in trust

15. TPI states that it received refunds from Williams for the period 1992-1995 but not for any prior period.

16. Since FI, TPI and MGUA have shown an interest in this proceeding, we will grant the late motions to intervene.

for payment to its members, (2) LDCs in trust for distribution to the ultimate customer based on class usage during the pertinent period, and/or (3) the former customers directly.

The State of Kansas and the Kansas Corporation Commission (collectively, the KCC), Kansas Gas Service (KGS) and UtiliCorp United (UtiliCorp), on behalf of its Kansas customers,[17] filed initial comments urging approval of the Settlement. In its initial comments, KGS states that the comments in MGUA's late filed notice of intervention are improper and legally and factually incorrect. KGS maintains that MGUA members did not purchase gas directly from Williams, but from Kansas LDCs and MGUA's concerns about how local distribution companies will distribute refunds to their customers involve matters that are reserved to the KCC. The KCC also answers MGUA's late filed notice of intervention in its initial comments. The KCC disputes MGUA's allegation that the KCC and its Staff misstated their position, noting it represents a myriad of interests, which means that every resolution determined by the KCC may not represent each party's optimal outcome. KCC concludes that MGUA's claims for refunds are not within FERC's purview.

Williams' initial comments restate the benefits of the Settlement, stress that the Settlement provisions are fair and reasonable when viewed on their merits in the context of

17. On behalf of its Missouri customers, UtiliCorp states that it agrees to be bound by the Settlement if the MoPSC elects to be bound by the Settlement. If the MoPSC opts out of the Settlement, UtiliCorp asserts its Kansas customers should still receive the full benefits of the Settlement.

pending competing claims, and urge the Commission to approve the Settlement without modification promptly.

Although it elected to opt out of the Settlement, the Missouri Public Service Commission (MoPSC) filed initial comments seeking assurance from the Sponsoring Parties and the Commission that the rights and claims of a Non-Settling Non-Producer Party, as well as any customers bound by a state commission's decision to be a non-settling party, are not compromised by the Settlement. MoPSC also requests that Appendix B to the Settlement be corrected to reflect the proper allocation of refunds to Missouri customers that are served by Greeley Gas Company and that the negative allocation of refunds to the City of Liberal, Missouri, be explained. MoPSC also requests that the Settlement be amended to provide that a Settling Producer Party will be released from any further liability only to Williams or any other settling party.[18]

In its Initial Comments, City Utilities of Springfield, Missouri (CU), a municipality not regulated by the MoPSC that elected to opt out of the Settlement, objects to the Settlement because Williams will make refunds to Kansas direct-sales customers, but has no plan to refund non-jurisdictional dollars to any other customers, including

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18. Section III.A presently provides "Each Settling Producer Party will be released from any further liability to Williams or any other party with respect to the entire non-jurisdictional portion of their refund. . ." MoPSC requests it to be revised to read "Each Settling Producer Party will be released from any further liability to Williams or any other **settling** party with respect to the entire non-jurisdictional portion of their refund. . ."

customers in Missouri. CU contends that since it was a direct sales customer as well as a wholesale customer of Williams during the period in question, some percentage of the non-jurisdictional refunds that Williams will retain under the Settlement belongs to CU. Therefore, CU objects to the Settlement's attempted resolution of this issue and to Williams' refusal to distribute these dollars to its non-Kansas direct sales customers.

TPI Petroleum (TPI) filed comments and a request for a technical conference. Although not necessarily contesting the Settlement, TPI asserts that the Commission should suspend approval pending a technical conference where Sponsoring Parties could explain the Settlement, provide and discuss any documentation supporting the Settlement, answer questions parties may have, and discuss the Settlement's ramifications to the "non-FERC jurisdictional customers" in Kansas. TPI maintains a technical conference is necessary because Williams has not provided information needed to analyze the Settlement. In addition, TPI states that the significant reduction in refund amounts, plus the elimination of all interest on such amounts, does not appear to be just and reasonable. TPI also questions the allocation of refunds between states and between customer classes within states.

IV. Reply Comments

In its reply comments, CU objects to Williams' suggestion that the Settlement will resolve claims relating to CU. CU reiterates that the Settlement does not resolve any of its claims since it is not regulated by the MoPSC and reserves its right to pursue refund claims on a FERC-

jurisdictional basis and on a non-jurisdictional/direst-sales basis. If the Commission ultimately approves the Settlement, CU argues that the approval should clearly state that its rights are not affected in any way by the Settlement.

The Indicated Producers (IP),[19] the KCC, KGS, Pioneer Natural Resources USA, Inc., and Williams filed reply comments supporting expeditious approval of the Settlement without modification. In addition, Williams, IP and KGS confirm that MoPSC's understanding of the rights and claims of a Non-Settling Non-Producer Party under the Settlement is correct. Williams and IP contend, however, that the Commission should not grant MoPSC's request to amend the Settlement because the change is not necessary to protect MoPSC's interest and would alter the compromise reached by the parties.

In response to CU's concern that the Settlement may impact CU's nonjurisdictional refund claim in Missouri, IP, KGS and the KCC assert that the Settlement has no impact on those claims. IP, KGS and the KCC further assert that CU is free to pursue any claims from Williams concerning nonjurisdictional refund claims in the appropriate legal or regulatory forum.

KGS, the KCC, IP and Williams dispute MGUA's claims that its members were customers of Williams during the relevant time period. They contend that MGUA's members purchased gas from LDCs that purchased gas from Williams.

19. Indicated Producers consist of Amoco Production Company, Mobil Oil Corporation, OXY USA Inc., and Union Pacific Resources Company.

Similarly, Williams and the KCC maintain that TPI's claim involves nonjurisdictional sales in Kansas. IP, Williams, the KCC and KGS[20] maintain that MGUA's and TPI's concerns involve matters that are solely within its purview and the Commission has no authority to direct the KCC to distribute refunds in any particular way. In addition, the KCC reports that on March 15, 2001, it administratively approved, without modification, the Stipulated Settlement Agreement (Appendix C to the Settlement). On April 4, 2001, the KCC filed a motion to lodge the Order Approving Stipulated Settlement Agreement it issued on March 29, 2001, in KCC Docket No. 99-GIMG-068-CIG.

KGS, IP and Williams contend that TPI totally misrepresents the Settlement. They note that the credit given to the producers is similar to that in other settlements and that interest is not entirely forgiven. They also assert that TPI's request for a technical conference should be summarily dismissed because it is unnecessary. Williams also refutes TPI's claims that TPI did not receive the information it requested from Williams. Williams states that it gave TPI every item of requested information and spent a great deal of time answering TPI's questions about the information and about the Settlement.

In response to TPI's question about allocation procedures, Williams asserts that the allocations are a product of lengthy negotiations among parties with divergent interests and the customer class allocations are one aspect of a delicate balance reached by the parties after lengthy,

20. KGS corrects the amount of interest to which Mobil will be entitled to receive when Mobil's overpayments are refunded.

difficult negotiations. Williams maintains that TPI's claims concerning the allocation to customers is focused on the KCC Stipulated Settlement since TPI is a non-jurisdictional direct-sale customer of Williams. Williams concludes that TPI's concerns are raised in the wrong forum since the KCC is the appropriate regulatory agency.[21]

In addition, in response to MoPSC, Williams revised the settlement to correctly reflect the refund situation of Greeley Gas Company and the City of Liberal, Missouri. Williams states MoPSC concurs with the changes.

V. Discussion

The Commission approves the Settlement as a reasonable means of resolving complicated *ad valorem* tax refund matters currently before the Commission. It has long been recognized that an agency's authority to approve settlements is an essential regulatory tool,[22] and that the wide discretion afforded in this area is supported by the broad public interest favoring the settlement of complex matters.[23] Settlement procedures provide the opportunity to eliminate the need for more lengthy proceedings, either formal or informal, when

21. Williams notes that the KCC's approval of the Stipulated Settlement Agreement on March 15, 2001, left for later resolution the questions associated with a distribution to TPI.

22. Pennsylvania Gas & Water Co. v. FPC, 463 F.2d 1242, 1246 (D.C. Cir. 1972) (*Pennsylvania*).

23. Southern Union Gas Co. v. FERC, 840 F.2d 964, 971 (D.C. Cir. 1988).

the parties reach an agreement on the issues and if that agreement is compatible with the public interest.[24]

The Settlement is supported by most active parties in the states of Kansas, Oklahoma, Texas, Nebraska and Colorado. The benefits of the Settlement extend beyond the relief granted therein, to further facilitating a comprehensive resolution to all issues and mitigation of administrative burdens. Approval of the Settlement will bring substantial relief to many consumers.

Moreover, as clarified by the Sponsoring Parties, the Settlement is entirely voluntary. It does not impose any resolution on any non-consenting first seller or potential refund recipient. Any non-consenting party is free to continue to litigate its refund obligation or entitlement to refunds. Therefore, our approval of the Settlement for those parties who choose to be bound by its terms does not adversely affect any other parties.[25]

In light of these considerations, we find that approval of the Settlement is in the public interest since it avoids administrative burdens that would be imposed on all parties in resolving the remaining refund claims. We are also hopeful that all of the remaining disputes on the Williams system will be resolved through settlements in the near future.

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24. *Pennsylvania*, 463 F.2d at 1247.

25. Arctic Slope Regional Corp. v. FERC, 832 F.2d 158, 164 (D.C. Cir. 1987) (Severance of a contesting party and approval of a settlement for the consenting parties is within the Commission's broad discretion in adopting appropriate procedures for contested settlements).

Appendix A

In response to MoPSC and CU, we understand, as the Sponsoring Parties do, that the rights and claims of a Non-Settling Non-Producer Party are not compromised by the Settlement. Therefore, there is no need to modify the Settlement to further clarify that MoPSC and the customers it regulates will not be affected by the Settlement.

We also find that CU's notice to opt out is adequate to protects its jurisdictional and non-jurisdictional refund claims. However, since CU's nonjurisdictional refund claims involve direct sales that are not within our jurisdiction, CU must pursue those claims in an appropriate forum. Likewise, any claims that TPI may have against Williams for refunds as a result of its direct sales purchases from Williams must be pursued in an appropriate forum.

We deny MGUA's request to direct refunds to be paid in trust or to certain former customers directly. To the extent that MGUA's members were customers of Kansas LDCs and are concerned about what portion of the LDC's refunds are flowed through to them, we have held that the distribution of refunds by an LDC is a matter within the purview of state and local regulatory authorities.[26] Further, even if MGUA members were direct customers of Williams during the relevant time period, the Commission also lacks jurisdiction with respect to Williams' direct sales since the Commission's jurisdiction extends to sales for resales. Therefore, MGUA's members who were direct sales customers of Williams must pursue refunds in a different forum.

26. See Northern Natural Gas Co., 93 FERC ¶ 61,311 (2000); Colorado Interstate Gas Co., 93 FERC ¶ 61,185 (2000); Columbia Gas Transmission Corp., 31 FERC ¶ 61,307 at 61,686 n.38 (1985).

Appendix A

We will deny TPI's request to suspend our consideration of the Settlement pending a technical conference. The refund credit provided in the Settlement is identical to the credit in other settlements we have approved and interest has not been waived. We fail to see what additional information or explanation is necessary for us to fully understand the Settlement.

The Commission orders:

The Settlement filed February 23, 2001, as amended on March 22, 2001, is approved.

By the Commission.

(SEAL)

David P. Boergers,
Secretary.

APPENDIX B — ORDER DENYING REHEARING ISSUED JUNE 11, 2001

UNITED STATES OF AMERICA 95 FERC ¶ 61,366
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP98-52-041

Before Commissioners: Curt Hébert, Jr., Chairman
William L. Massey, Linda Breathitt, and Pat Wood III.

Williams Gas Pipelines Central, Inc.

ORDER DENYING REHEARING

(Issued June 11, 2001)

On April 12, 2001, the Commission approved a Settlement Agreement (Settlement) involving the refund of Kansas *ad valorem* taxes.[1] The Settlement is a partial resolution of *ad valorem* tax refund claims asserted by Williams Gas Pipelines Central, Inc. (Williams) that were not resolved by a previous settlement that resolved other *ad valorem* tax refund claims made by Williams. Midwest Gas Users' Association (MGUA) filed a request for rehearing. For the reasons set forth the Commission denies rehearing.

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1. 95 FERC ¶ 61,055 (2001).

Appendix B

Background

In *Public Service Company of Colorado v. FERC* (*Public Service*)[2] the Court upheld the Commission's decision that Kansas *ad valorem* taxes were improperly added to the maximum lawful prices under the Natural Gas Policy Act (NGPA), and ordered first sellers/producers to make refunds of reimbursements they had received from pipelines for certain *ad valorem* taxes. On September 10, 1997, the Commission issued an order (Procedural Order) implementing the *Public Service* decision.[3] The Procedural Order established procedures and timetables for producers to make refunds to the pipelines and for the pipelines to flow the refunds through to their customers.

In accordance with procedures established by the Commission, Williams sought refunds from 652 operators and working interest owners (WIO). Many of the parties from whom Williams sought refunds disputed Williams' claims, and/or sought relief in formal proceedings filed with the Commission. In an effort to resolve these matters, representatives of the

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2. 91 F.3d 1478 (D.C. Cir 1996), *cert. denied*, 520 U.S. 1224 (1997).

3. Public Service Co. of Colorado, *et al.*, 80 FERC ¶ 61,264 (1997), *reh'g denied*, 82 FERC ¶ 61,058 (1998). The Court affirmed the Commission in *Anadarko Petroleum Co. v. FERC*, 196 F.3d 1264, *reh'g*, 200 F.3d 867 (D.C. Cir.), *cert. denied*,147 L Ed.2d 248 (June 6, 2000). The Court remanded one issue concerning the starting date for refunds, and the Commission issued an order addressing the remand, Public Service Company of Colorado, 91 FERC ¶ 61,025, *reh'g denied*, 93 FERC ¶ 61,264 (2000), *appeal pending sub nom*, Atlantic Richfield Co. v. FERC, No. 01-1065 (D.C. Cir. filed Feb. 9, 2001).

various interests involved in the proceeding participated in extensive settlement discussions that led to the filing of the previous settlement, which the Commission approved on October 11, 2000.[4] That settlement eliminated the claimed refund obligations of 636 of 652 working interest owners that Williams had identified as having refund obligations.

The settlement we approved on April 12 resolves some of the remaining outstanding refund claims in this proceeding. Since the Settlement is fully described in the April 12 order, we will only describe here those portions of the Settlement relevant to the issues raised on rehearing. The Settlement, along with a Stipulated Settlement Agreement filed with the KCC (and attached to the Settlement as Appendix C), resolves all issues between the Settling Parties, but will not affect claims among non-Settling Parties. Williams' jurisdictional customers in Missouri are among the non-Settling customers.

Article VI of the Settlement sets forth an agreed-upon allocation of Williams' ad valorem tax refunds related to the interests of Williams' settling customers in states other than Missouri (non-Missouri refunds). Article VI provides that 68.653 percent of the non-Missouri refunds will be allocated to Kansas jurisdictional customers as a group and 16.655 percent will be allocated to Kansas non-jurisdictional customers as a group.[5] The remaining non-Missouri refunds are allocated to Oklahoma, Nebraska, Texas, and Colorado

4. 93 FERC ¶ 61,030 (2000).

5. The Kansas jurisdictional customers are customers to whom Williams made sales for resale. The Kansas non-jurisdictional customers are customers to whom Williams made direct sales.

jurisdictional customers. Article VI further provides that the amounts allocated to the various jurisdictional groups shall be distributed among the customers in each group based on the percentage allocations set forth in Appendix B to the settlement. The percentage allocations in Appendix B are based on each customer's proportionate share of Williams total sales to that customer's jurisdictional group during the refund period.

Attached to the settlement is a so-called "Stipulated Settlement Agreement," approved by the KCC. The Stipulated Settlement Agreement provides for how the 16.655 percent of the non-Missouri refunds which the Settlement allocates to Kansas non-jurisdictional customers will be allocated among those customers.[6]

MGUA filed objections to and comments on the proposed settlement. MGUA asserted that during the relevant refund period, its members were customers of Williams and its predecessors under Rate Schedules C and I, purchasing approximately 30% of the total volumes sold by Williams during that period and paying approximately 30% of the total volumetric overcharges on the Williams system. MGUA

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6. Williams is one of the interstate pipelines involved in a proceeding before the Kansas Corporation Commission (KCC) in Docket No. 99-GIMG-068-GIG that pertains to Kansas non-jurisdictional *ad valorem* tax refunds. The KCC reported that on March 15, 2001, it administratively approved, without modification, the Stipulated Settlement Agreement (Appendix C to the Settlement). The Commission has not passed on the Stipulated Settlement Agreement, since it involves direct sales, a matter outside the Commission's jurisdiction.

protested that the Settlement does not give assurance to Kansas ratepayers that they will ultimately receive their appropriate share of refunds. MGUA stated that to assure Kansas ratepayers that they will receive their appropriate share of refunds, the Commission should not approve the Settlement without a condition requiring Williams to make payments to: (1) Midwest in trust for payment to its members, (2) Local Distribution Companies (LDCs) in trust for distribution to the ultimate customer based on class usage during the pertinent period, and/or (3) the former customers directly.

The State of Kansas and the Kansas Corporation Commission (collectively, the KCC), Kansas Gas Service (KGS), and UtiliCorp United (UtiliCorp) filed answers to MGUA's objection. KCC maintained that MGUA members did not purchase gas directly from Williams, but from Kansas LDCs.[7] KGS, an LDC, stated that all the MGUA members did not purchase directly from Williams, but rather through KGS. Williams sold the gas to KGS, and KGS then resold the gas to the MGUA members. KCC, KGS, and UtiliCorp accordingly asserted that MGUA's concerns relate to how local distribution companies will distribute their refunds to their customers and that such matters are beyond the Commission's jurisdiction and are reserved to the KCC. The KCC also disputed MGUA's allegation that the KCC and its Staff misstated their position, noting the KCC represents a myriad of interests, which means that every resolution determined by the KCC may not represent each party's optimal outcome.

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7. Reply Comments of Williams ¶13 at 7, and Reply Comments of KGS ¶7 at 5.

Appendix B

MGUA did not dispute the accuracy of the facts set forth in the reply comments of Williams and KGS concerning the gas purchases by MGUA members. In Appendix B, the amount of Kansas sales attributable to KGS is almost 80% of Williams' sales in the state of Kansas and almost 30 percent of Williams' total sales during the refund period. That is consistent with the assertion that purchases by MGUA members are included in the amount of jurisdictional sales in Kansas.

The Commission approved the Settlement, and denied MGUA's request to direct refunds to be paid in trust or to certain former customers directly. The order stated that to the extent that MGUA's members were customers of Kansas LDCs their concern about what portion of the refunds going to the LDCs are flowed through to them is a matter within the purview of state and local regulatory authorities, not the Commission.[8] Moreover, it stated that even if MGUA members had been direct customers of Williams, the Commission lacks jurisdiction with respect to refunds relating those direct sales since the Commission's jurisdiction extends only to sales for resale.

The Request for Rehearing

MGUA's request for rehearing reiterates the same grounds that it urged in objecting to the settlement. In essence it claims that the Commission should not have approved the

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8. The order cited Northern Natural Gas Co., 93 FERC ¶ 61,311 (2000); Colorado Interstate Gas Co., 93 FERC ¶ 61,185 (2000); Columbia Gas Transmission Corp., 31 FERC ¶ 61,307 at 61,686 n.38 (1985) (*Columbia Gas*).

settlement because the KCC may order a distribution of the refunds that does not reflect the amount of overcharges each customer paid. Although MGUA asserts again, that for the relevant period, its members were purchasers of natural gas under Williams' Rate Schedule C and Rate Schedule I, it also refers to its members' interests in the refunds as that of "ratepayers who were former indirect sales customers."[9] MGUA contends that these customers purchased roughly 30 percent of the total volumes of gas sold during that period by Williams or its predecessor. Accordingly, MGUA asserts that these customers, paid roughly 30 percent of the Kansas *ad valorem* overcharges pertinent to the Williams system and should receive that amount of the refunds. Instead, the KCC is considering the distribution of the refunds in a manner that will not give the MGUA members their fair share of the refunds. MGUA contends that the Commission erred in deferring to the KCC to make distribution of refunds to consumers in the State of Kansas because it states the KCC had incorrectly represented its status as a consumer representative.

MGUA further contends that the Commission has not followed the Court's remand that the refunds are to be directed to the consumers that paid the overcharges. MGUA asserts that the Commission should have adopted the modifications to the settlement that MGUA had proposed. Finally, MGUA argues that the Commission should have required the parties to reopen the negotiations where the interest of the ultimate consumers would in fact be represented.

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9. Rehearing at 3-4.

Appendix B

Discussion

On rehearing, MGUA does not dispute how the refunds will be allocated to the various customer classes under the provisions of Article VI of the Settlement which establishes the percentages of the non-Missouri refunds to be allocated to each Kansas jurisdictional customer served directly by Williams. Nor does MGUA attack the Stipulated Settlement Agreement that involves the refunds going to Kansas non-jurisdictional customers.[10] Rather, MGUA's concern is how the refunds the Settlement allocates to the jurisdictional customers served directly by Williams are to be distributed to those customers' ratepayers in Kansas, who include the MGUA members.

MGUA argues that the Commission erred by failing to "adequately address the interests of ratepayers who were former indirect sales customers" of Williams, which "deprives these consumers of their refunds in violation of law."[11] The crux of that concern is the KCC's "recent decision to confiscate the *ad valorem* refunds of all Kansas consumers and divert them to selected low income customers in amounts that will exceed even the KCC's own Staff's evidence of

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10. None of the members listed by MGUA are included in the list of Kansas direct customers in the Stipulated Settlement Agreement. As a result, the volumes purchased by MGUA's members from LDCs are included in the jurisdictional sales volumes on Appendix B to the Settlement, which details how the refunds will be distributed.

11. Rehearing at 3-4.

need." [12] That concern is not a basis to deny approval of the Settlement which resolves the amounts that were collected in excess of the maximum lawful price, and how the refunds will be distributed to various customer classes.

The Commission's orders, starting with the *Colorado Interstate Gas Company* order[13] have, consistent with the court remands, required interstate pipelines to "pass through any *ad valorem* tax refunds they received from first sellers" to the "customers who overpaid the pipelines." [14] Those are the customers of Williams who purchased the gas from Williams. The court never required that the Commission mandate that the refunds go to the ultimate consumer. In *Public Service* the court approved the Commission's refund procedures.[15]

How the customers of the pipeline who receive the refund from the pipeline, mainly LDCs, flow through the refund to their customers is within the purview of the state regulatory bodies, such as the KCC. The Commission has no jurisdiction to dictate how that should be done. Thus, MGUA's allegations concerning the KCC's conflict of interest, which MGUA has not established, have no relevance to whether the Commission should approve the Settlement. For MGUA members who purchased gas from LDCs, the forum for

12. Rehearing at 8.

13. 65 FERC 61,292 (1993).

14. 65 FERC at 62,374.

15. 91 F.3d at 1491.

presenting their argument that they should receive refunds in the same proportion as their purchases of gas is at the KCC,[16] not the Commission. As the Commission has stated:

We note that we cannot provide specific refunds to PGC or any other customer served by a distributor-customer of Columbia. We lack jurisdiction over the rates charged by local distribution customers. Charges and refunds by local distribution companies are within the purview of state and local regulatory authorities. Natural Gas Act, 15 U.S.C. § 717(b)(1982).[17]

Accordingly, since MGUA does not contend that the Settlement itself is flawed, but only objects to how the KCC may treat the refunds received under the Settlement, a matter over which this Commission has no jurisdiction, we will deny rehearing.

The Commission orders:

The request for rehearing is denied.

By the Commission

(SEAL)

David P. Boergers,
Secretary.

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16. Proceedings are pending in Kansas on the distribution of the refunds received by jurisdictional customers under the Settlement.

17. *Columbia Gas* 31 FERC at 61,686.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT GRANTING MOTION FOR SUMMARY AFFIRMANCE DATED AND FILED DECEMBER 7, 2001

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1342 **September Term, 2001**

Midwest Gas Users Association,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent

Kansas Gas Service Company, et al.,

Intervenors

BEFORE: Rogers and Tatel, Circuit Judges; Williams, Senior Circuit Judge

ORDER

Upon consideration of the motion for summary affirmance, or in the alternative, to dismiss for lack of jurisdiction, the responses thereto, and the reply, it is

ORDERED that the motion to dismiss be denied. The Kansas Corporation Commission has already determined it will not grant petitioner the relief it desires. Because this court could redress petitioner's alleged injury if petitioner's claim on the merits is correct, petitioner has standing. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Military Toxics Project v. Environmental Protection Agency*, 146 F.3d 948, 953-54 (D.C. Cir. 1998). It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980).

Petitioner did not waive its argument that the Federal Energy Regulatory Commission has jurisdiction to grant petitioner its requested relief. Respondent correctly determined, however, that neither Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717(b), nor the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.*,

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1342 **September Term, 2001**

authorizes the Federal Energy Regulatory Commission to require the pass through of the Kansas *ad valorem* tax refunds to the ultimate consumers of natural gas. *See FERC v. Martin Exploration Management Co.*, 486 U.S. 204, 207 (1988) (Natural Gas Policy Act of 1978); *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 516-17 (1947) (Natural Gas Act).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

s/ JWR
[Judge Judith W. Rogers]

s/ DST
[Judge Tatue]

s/ SFW
[Judge Stevens F. Williams]

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING BY PANEL DATED AND FILED FEBRUARY 15, 2002

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1342 **September Term, 2001**

Midwest Gas Users' Association,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent

Kansas Gas Service Company, et al.,

Intervenors

BEFORE: Rogers and Tatel, Circuit Judges; and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for rehearing filed January 17, 2002, and the supplement thereto, it is

Appendix D

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: s/ Michael C. McGrail
Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 15, 2002

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1342 **September Term, 2001**

Midwest Gas Users Association,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent

Kansas Gas Service Company, et al.,

Intervenors

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson,* Randolph, Rogers, Tatel and Garland,* Circuit Judges; Williams, Senior Circuit Judge

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* Circuit Judges Henderson and Garland did not participate in this matter.

Appendix E

ORDER

Upon consideration of petitioner's petition for rehearing en banc, the supplement thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: s/ Michael C. McGrail
Deputy Clerk